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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT IL
BENTON OFFICE

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

NL INDUSTRIES, INC., et al.,)

Defendants,)

and)

CITY OF GRANITE CITY, ILLINOIS,)

LAFAYETTE H. HOCHULI, and)

DANIEL M. McDOWELL,)

Intervenor-Defendants.)

CASE NO. 91-CV-578-JLF

MEMORANDUM AND ORDER**FOREMAN, District Judge:**

Before the Court is plaintiff's Motion for Entry of the Proposed Consent Decree between the United States and NL Industries (Doc. 295). This Court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (CERCLA), 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331, 1345, and 1355.¹

¹The Court notes that on July 1, 2002, Exide Corporation, (now Exide Technologies, Inc.), filed a suggestion of bankruptcy. Despite Exide's bankruptcy filing, the Court finds that it may proceed with this action. As an initial matter, the Court finds that it has jurisdiction to determine whether this action is stayed. See *NLRB v. P*I*E* Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991) ("the applicability of the automatic stay provision is a question of law within the competence of the judiciary").

I. Factual Background.

The NL Industries/Taracorp Superfund Site, (the "Site"), occupies roughly 16 acres in Granite City, Illinois, that were previously the location of a battery recycling facility and secondary lead smelter from 1903 to 1983. Also included in the site are approximately 55 square blocks of residential property surrounding the smelter, as well as certain fill locations in Granite City, Madison, and Venice, Illinois. The smelter was owned by NL Industries ("NL") from 1928 until August of 1979, when NL sold the plant to Taracorp Industries, Inc. Battery recycling operations began at the site in the 1950's. As a result of the smelting and battery recycling operations, there is an estimated

Section 362(b)(4) of the Bankruptcy Code provides that bankruptcy petitions do not operate as a stay of:

... the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's ... police or regulatory power ...

11 U.S.C. § 362(b)(4).

Although not yet addressed by the United States Court of Appeals for the Seventh Circuit, all other circuits considering the question have held that CERCLA cost recovery actions fall within the exemption from the automatic stay provision in 11 U.S.C. § 362(b)(4). *See City of New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Nicolet, Inc.*, 857 F.2d 202 (3rd Cir. 1988); *Matter of Commonwealth Oil Ref. Co.*, 805 F.2d 1175 (5th Cir. 1986). *See also United States v. Acme Solvents Reclaiming, Inc.*, 154 B.R. 72 (N.D.Ill. 1993) (automatic stay does not apply to CERCLA action regardless of whether proceeding seeks monetary or injunctive relief). Accordingly, this Court finds that it may proceed with this action.

250,000-ton waste pile of material on the site containing antimony, arsenic, barium, cadmium, chromium, lead, mercury, nickel, and zinc (the "Taracorp Pile").

The public, which had free access to the Taracorp pile, used waste material in the surrounding community as fill material in alleys and driveways. In addition, the smelting operations resulted in the emission of lead and other hazardous substances into the air, which were deposited in the surrounding community.

II. Procedural Background.

In June 1986, the site was placed on the National Priorities List pursuant to 42 U.S.C. § 9605, 51 Fed. Reg. 21054 (June 10, 1986). Between 1985 and 1990, NL Industries performed a Remedial Investigation and Feasibility Study at the site. On January 10, 1990, the United States Environmental Protection Agency ("EPA") issued a proposed clean-up plan and invited public comment. The EPA issued its Record of Decision ("ROD") on March 30, 1990, which set forth its plan for remedial action at the site. On November 27, 1990, the EPA issued a unilateral administrative order (UAO) requiring various parties to commence clean-up operations at the site. (Doc. 1, Attach. 1). None of the defendants complied with the UAO.²

²The proposed remedial actions at the site include:

- 1) Excavation of residential areas at the site where soils and battery case materials contain lead concentrations in excess of 500 parts per million ("ppm"). The excavated material would either be consolidated with the Taracorp pile or disposed of off site.

On July 31, 1991, plaintiff filed suit, seeking both civil penalties and cost recovery under CERCLA Section 107(a), against the following defendants for their failure to comply with the UAO: NL Industries, Johnson Controls, Inc., AT&T, (now Lucent Technologies, Inc.), Exide Corporation, (now Exide Technologies, Inc.), Allied Signal, Inc., (now Allied Signal, Inc.), Gould, Inc., (now GNB Technology), General Battery Corporation, Southern Scrap Metal Processor, Inc., Ace Scrap Metal Processors, Inc., and St. Louis Lead Recyclers.

Under a case management order approved by this Court, the initial phase of the litigation focused on the defendants' challenge to the EPA remedy. Granite City, Illinois, intervened in the action, and filed a motion to restrain the EPA from implementing the remedy on the ground that the administrative record did not justify the cleanup of

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- 2) Excavation of all unpaved, non-residential areas at the site where lead concentrations exceed 1000 ppm.
 - 3) Consolidation of the separate waste piles with the Taracorp pile.
 - 4) Construction of a cap over the Taracorp pile and a clay liner under the material added to the Taracorp pile.
 - 5) Development of contingency plans for possible air and groundwater contamination.
 - 6) Removal of all drums at the site.
 - 7) Installation of groundwater monitoring wells; monitoring of air and groundwater and; inspection and maintenance of the cap on the Taracorp pile.

residential yards below 1,000 ppm. The remedy was remanded to the EPA and the administrative record was supplemented on the issue of the appropriate cleanup standard. The EPA then required excavation of soils containing at least 500 ppm for lead in residential soils at the Site.

In the Spring of 1996, the EPA began to implement that part of the remedy requiring excavation of residential soil at levels above 500 ppm. Granite City renewed its motion for a temporary restraining order. This Court denied Granite City's motion for a temporary restraining order holding that Section 113(h)(4) of CERCLA divested it of jurisdiction to review the EPA's remedy and that Granite City had failed to show any danger of irreparable harm. Thereafter, the EPA proceeded with all aspects of the remedy and in July, 1998, allowed certain defendants to take over completing the remediation.

Plaintiff has reached agreements with all defendants except NL Industries, Ace Scrap Metal Processors, Inc. and St. Louis Lead Recyclers. The proposed Consent Decree would resolve plaintiff's claims against NL Industries. Plaintiff is still attempting to resolve its claims against Ace Scrap Metal Processors, Inc. and St. Louis Lead Recyclers.

On October 16, 1995, the Court entered a consent decree reached between plaintiff and Southern Scrap Metal Processor, Inc. (Doc. 204). On March 18, 2003, the Court entered a consent decree reached between plaintiff and Johnson Controls, Inc., AT&T, (now Lucent Technologies, Inc.), Exide Corporation, (now Exide Technologies, Inc.), Allied Signal, Inc., (now Allied Signal, Inc.), Gould, Inc., (now GNB Technology), and

General Battery Corporation. Doc. 290). For ease of reference, these entities, who are parties to these two consent decrees with plaintiff, will be referred to as "settling generators."

The October 16, 1995 consent decree provides that Southern Scrap Metal shall pay plaintiff \$20,000 for response costs and \$10,000 as a penalty. The March 18, 2003 Consent Decree provides that the other settling generators will: 1) complete the remediation selected by the EPA at an estimated cost of \$19,550,000 out of a total estimated cost of \$60,600,000; 2) pay the Superfund \$8,978,000 to reimburse past response costs and as well as pay future oversight costs; 3) pay a Superfund penalty of \$400,000; and 4) complete a lead abatement program supplemental environmental project at a minimum cost of \$2,000,000.

With regard to the proposed Consent Decree with NL Industries currently before the Court, on December 19, 2002, plaintiff filed a Notice of Lodging of Proposed Consent Decree (Doc. 287). This Notice was published in the *Federal Register* on January 2, 2003 (68 Fed. Reg. 130-01). After a thirty-day public comment period, plaintiff received no comments. On March 21, 2003, plaintiff filed a Motion for Entry of the Proposed Consent Decree. This motion is discussed below.

III. The Proposed Consent Decree.

The proposed Consent Decree provides that NL Industries will do the following:

- 1) pay \$29,780,000 to the Hazardous Substances Superfund (Superfund) within thirty (30) days of entry of the Decree; 2) pay up to an additional \$710,000 to the Superfund,

depending on the outcome of an audit of certain response costs relating to the Site; and 3) pay a penalty of \$1,000,000 for failure to comply with the UAO. At the time NL Industries and plaintiff reached this agreement, plaintiff's unreimbursed response costs relating to the Site and the estimated costs to complete implementation of the remedy totaled approximately \$63,460,000. Because other settling defendants have been conducting, (and have agreed to finish conducting), the remediation, the proposed Consent Decree does not require NL Industries to perform any remedial action.

The proposed Consent Decree also states that upon complete and satisfactory performance by NL Industries of its obligations under the Consent Decree, plaintiff will provide a covenant not to sue pursuant to CERCLA Sections 106 and 107(a). The covenant not to sue, however, is subject to "reopener" provisions that give plaintiff the right to seek an order compelling NL to perform further response actions relating to the site, and to reimburse plaintiff for additional response costs if previously unknown conditions at the site are discovered which indicate that the proposed remedial action is not protective of human health or of the environment. In addition, the proposed Consent Decree also protects NL Industries, under 42 U.S.C. § 9613(f), against contribution actions by third parties relating to response costs incurred in connection with the Site.

IV. Standard of Review.

This Court must review the proposed Consent Decree to assure that it is fair, reasonable, and consistent with applicable law. *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *United States v. Akzo Coating of America, Inc.*, 949 F.2d 1409,

1435 (6th Cir. 1991); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); and *Metropolitan Housing Dev. Corp v. Village of Arlington Heights*, 616 F.2d 1006, 1014-15 (7th Cir. 1980). The purpose of this review is to determine whether the decree adequately protects and is consistent with the public interest. *United States v. Seymour Recycling Corp.*, 554 F.Supp. 1334, 1337 (S.D.Ind. 1982) (*citation omitted*). The Court need not inquire, however, into the precise legal rights of the parties, nor review the merits of the case. *Metropolitan*, 616 F.2d at 1014. It is sufficient if the Court determines whether the Consent Decree is appropriate under the particular facts of the case and that there has been valid consent by concerned parties. *Id.* (*citations omitted*).

It is the policy of CERCLA to encourage settlements. "That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *Cannons*, 899 F.2d at 84 (*citations omitted*). Respect for the agency's role in settlement negotiations is heightened when the affected parties, themselves knowledgeable and represented by experienced counsel, have reached an agreement at arm's length and advocate entry of the agreement in a judicial decree. *Id.* The most important factor in evaluating a proposed Consent Decree is whether the decree would be in the public interest. *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1027 (D. Mass. 1989).

The relevant standard "is not whether the settlement is one which the court itself might have fashioned, or considers ideal, but whether the proposed decree is fair,

reasonable, and faithful to the objectives of the governing statute." *Cannons*, 899 F.2d at 84 (citing *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600 (1st Cir. 1990)). While the Court should not "mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement *de novo*." *Cannons*, 899 F.2d at 84. Approval of a Consent Decree is committed to the Court's informed discretion. *Id.* However, in making such an assessment, the district court must refrain from second-guessing the Executive Branch. *Id.*; see also *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994) ("[A] trial court, without abdicating its responsibility to exercise independent judgment, must defer heavily to the parties' agreement and the EPA's expertise."). A settlement may be deemed unreasonable if it is based on "a clear error of judgment, a serious mathematical error, or other indicia that the parties did not intelligently enter into the compromise." *United States v. Acton Corp.*, 733 F. Supp. 869, 872 (D.N.J. 1990) (citing *United States v. Rohm & Haas, Co.*, 721 F. Supp. 666, 686 (D.N.J. 1989)).

V. Evaluation of the Proposed Consent Decree.

In the context of a CERCLA settlement, fairness has both procedural and substantive components. *Cannons*, 899 F.2d at 86-7. These two components are discussed below.

A. Procedural Fairness.

When measuring procedural fairness, "a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance."

Cannons, 899 F.2d at 86 (*citations omitted*). Here, no one has challenged the Consent Decree on the ground that it lacks procedural fairness, and the Court finds no evidence that negotiations were conducted at less than arm's-length. To the contrary, this litigation has been pending since 1991, and negotiations have been extensive and ongoing. Accordingly, the Court finds that the proposed Consent Decree is procedurally fair.

B. Substantive Fairness.

Substantive fairness means that "a party should bear the cost of the harm of which it is legally responsible." *Cannons*, 899 F.2d at 87 (*citing Developments in the Law-Toxic Waste Litigation*, 99 Harv.L.Rev.1458,1477 (1986)). Substantive fairness dictates that "settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if imprecise) estimates of how much harm each PRP [potentially responsible party] has done." *Cannons*, 899 F.2d at 87 (*citation omitted*).

[W]hat constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to the EPA's expertise. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs [potentially responsible parties].

Id. (*citations omitted*).

The Court need not ensure that the settlement is perfectly calibrated in terms of shares of liability so long as it is generally fair and reasonable. *Acushnet River*, 712 F.

Supp. at 1032. The agency's chosen measure of comparative fault should be upheld unless it is "arbitrary, capricious, and devoid of a rational basis." *Cannons*, 899 F.2d at 87 (citing 42 U.S.C. § 9613(j) (1987) and *Rohm & Haas*, 721 F.Supp. at 681)).

Specifically, the Court's task is:

not to make a finding of fact as to whether the settlement figure is exactly proportionate to the share of liability appropriately attributed to the settling parties; rather, it is to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolutions.

Rohm & Haas, 721 F. Supp. at 680-81 (citing *Acushnet River*, 712 F. Supp. at 1032).

Upon review, the Court finds that the proposed Consent Decree is substantively fair. The proposed Consent Decree provides that NL Industries will: 1) pay \$29,780,000 to the Hazardous Substances Superfund (Superfund) within thirty (30) days of entry of the Decree; 2) pay up to an additional \$710,000 to the Superfund, depending on the outcome of an audit of certain response costs relating to the Site; and 3) pay a penalty of \$1,000,000 for failure to comply with the UAO.

When NL Industries and plaintiff reached this agreement, the United States' unreimbursed response costs relating to the Site and the estimated costs to complete implementation of the remedy totaled approximately \$63,460,000. Accordingly, NL's commitment to pay a minimum of \$30,780,000 (\$29,780,000 + \$1,000,000) represents over 48% of the anticipated Site costs at the time the agreement was reached. Similarly,

when plaintiff reached an agreement with the settling generators, the estimated cost of remediation was \$60,600,000. The settling generators' promise to pay a minimum of \$28,940,000 (\$19,550,000+\$8,970,000+\$400,000+\$20,000) also approximates 48% of the anticipated Site costs at the time their agreement was reached.

Based on the figures above, plaintiff's settlements with NL Industries and with the settling generators appear to apportion most of the liability in the approximate ratio of 50% to NL Industries as owner, and 50% to settling generators who were responsible for processing the hazardous materials. Under the circumstances of this case, particularly where the settlements have been separately negotiated rather than globally, the Court finds that this apportionment of liability between NL Industries and the settling generators is substantively fair. See e.g. *Pneumo Abex Corp. V. Bessemer & Lake Erie R.R. Co.*, 936 F.Supp. 1250, 1273 (E.D. Va. 1996) (district court found that a rational basis existed for allocating 50% liability to owner-operator of railroad parts foundry and 50% liability to customers who used foundry for reprocessing scrap bearings).

Furthermore, the Court notes that the negotiation process has certainly been fair and full of "adversarial vigor." *City of New York v. Exxon Corp.*, 697 F.Supp. 677, 693 (S.D.N.Y.1988). This litigation has been pending since 1991. Plaintiff and NL Industries, and the other settling defendants have been well-represented, and this case has been fought vigorously on all sides. As such, the results come before the Court with "a much greater assurance of substantive fairness." See *Cannons*, 899 F.2d at 87 n.4. For all of the above reasons, the Court finds that the proposed Consent Decree is

substantively fair.

C. Reasonableness.

In assessing the reasonableness of a proposed Consent Decree, the Court evaluates three factors: (1) "the decree's likely efficaciousness as a vehicle for cleansing the environment[;]" (2) "whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures[;]" and (3) "the relative strength of the parties' litigating positions." *Cannons*, 899 F.2d at 89-90. "A settlement may be deemed unreasonable . . . if it is based on a clear error of judgment, a serious mathematical error, or other indicia that the parties did not intelligently enter into the compromise." *Acton Corp.*, 733 F. Supp. at 872 (citing *Rohm & Haas*, 721 F. Supp. at 686).

Here, the Court finds that the proposed Consent Decree satisfies all three factors of reasonableness. As to the first factor, (i.e., the decree's likely efficaciousness as a vehicle for cleansing the environment), settling defendants other than NL Industries are conducting the cleanup of the Site. In fact, much of the remedial work has already been completed. As such, the proposed Consent Decree does not require NL Industries to perform any remedial action and the first factor is not at issue.

As to the second factor, (i.e., whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures), the proposed Consent Decree provides that NL Industries will pay \$29,780,000 of response costs as well as a \$1,000,000 penalty for NL's failure to comply with the UAO. As noted,

this amounts to 48% of the response costs estimated at the time the agreement was reached. The proposed Consent Decree also provides that NL will pay up to an additional \$710,000 into the Superfund for past response costs. As noted, the March 18, 2003 Consent Decree provides that the settling generators are bearing approximately 48% of the remedial and response costs. Under these circumstances, the Court finds that the proposed Consent Decree with NL Industries meets the second reasonableness factor of ensuring that the public will be fully compensated for clean-up costs at the site.

As to the third factor, the Court finds that the settlement is appropriate in light of the relative strength of the parties' respective legal positions. The government's legal position appears strong and solid, and as such, the proposed Consent Decree provides that it will receive a substantial sum of money for past response costs, as well as a sizeable penalty. On the other hand, NL Industries will receive protection against third-party contribution actions. In light of all of the circumstances, the Court finds that the settlement, in light of the relative strength of the parties' respective legal positions, is reasonable. *See e.g., Rohm*, 721 F.Supp. at 680 (interpreting reasonableness in light of Congressional goal of expediting effective remedial action and minimizing litigation)); *United States v. McGraw-Edison Co.*, 718 F.Supp. 154, 159 (W.D.N.Y. 1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to expeditious reimbursement and remedy); and *Acushnet*, 712 F.Supp. at 1030 (emphasizing that trial would likely be "complex, lengthy, expensive and uncertain"). For all of the above reasons, the Court finds that the proposed Consent Decree is reasonable.

D. Fidelity to the Objectives of CERCLA.

CERCLA's primary objectives are "accountability, the desirability of an unsullied environment, and promptness of response activities." *Cannons*, 899 F.2d at 91. An evaluation of these factors necessarily overlaps with the Court's assessment of the proposed decree's fairness and reasonableness. *Id.* at 90.

The Court's independent analysis of the proposed Consent Decree reveals that the decree fulfills the purposes of CERCLA. No one disputes that the government made a due and diligent search to identify the potentially responsible parties. There is also no dispute that the proposed Consent Decree provides for a reasonable allocation of responsibility and for the promotion of early cleanup. Finally, no one disputes the technical efficacy of the proposed remedy. For these reasons, the Court finds that the proposed Consent Decree fulfills the primary objectives of CERCLA. *See e.g., Cannons*, 899 F.2d at 91 (finding Consent Decree consistent with CERCLA's purposes after considering: (1) effort to identify all PRPs; (2) reasonable allocation of responsibility; (3) promotion of early clean-up; and (4) technical efficacy of proposed remedy).

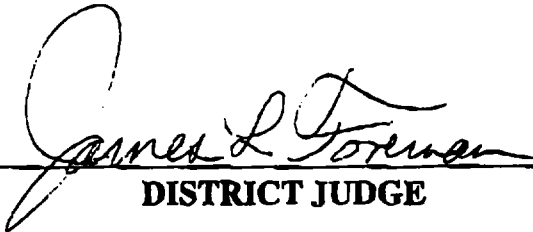
VI. Conclusion.

For the foregoing reasons, the Court finds that the Consent Decree reached between the United States and NL Industries is fair, reasonable, and consistent with the objectives of CERCLA. Accordingly, plaintiff's motion for entry of the proposed Consent Decree (Doc. 295) is **GRANTED**. The Clerk of the Court is **DIRECTED** to

enter the document attached to Document Number 287 and docket it as a Consent Decree.

IT IS SO ORDERED.

DATED: 5/12/03.



DISTRICT JUDGE

